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IN THE

Supreme Court of the United States

HENRY A. ESCHENBACH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

On the fundamental issue raised by the individual petitioners, the government's brief in opposition ("U.S. Br.") neither defends the merits of the Ninth Circuit's ruling nor claims that its approach was consistent with the precedents of this Court or the other federal courts of appeals. Though conceding that the Ninth Circuit did "refer to" petitioners' "knowledge of asbestos," U.S. Br. 21, the government does not argue that this was a correct standard, or one that has been accepted by this Court or other courts. Rather, implicitly acknowledging the unprecedented—and erroneous— nature of the Ninth Circuit's approach, the government claims that the Ninth Circuit's remarks were merely "dictum." U.S. Br. 22. But even a cursory review of the Ninth Circuit's opinion shows that the panel relied heavily on the petitioner's supposed subjective knowledge of "asbestos." This unprecedented use of subjective intent to assess the notice provided by a statute—exacerbated by the utter lack of evidentiary foundation for the panel's speculation—is a dramatic and far-reaching departure from precedent that requires this Court's immediate review.

As discussed thoroughly in W.R. Grace's reply, in which the individual petitioners join, the government's other reasons for denying the petitions are insubstantial, and sometimes border on the disingenuous. Contrary to the government's primary argument, the interlocutory posture of this petition provides no basis for denying review. The issue presented in this petition is dispositive of the substantive Clear Air Act ("CAA") charges and the

CAA object of the conspiracy alleged in the indictment. A pretrial decision affirming the district court's definition of "asbestos" would therefore substantially shorten the trial.

Considerations of fairness, effective judicial review, and conservation of judicial resources all favor prompt review. The individual petitioners are all more than 68 years old and have been under indictment for more than three years. The government has estimated that its case-in-chief will include more than 230 witnesses and almost 750 exhibits. There is no reason that these aging petitioners should face a long and unnecessary trial under a manifestly erroneous legal standard. The CAA charges that depend on this ruling also carry the risk of substantial cross-over prejudice. Moreover, if the petitioners were to prevail at trial, the Ninth Circuit's erroneous ruling would escape this Court's review. Finally, having initiated this interlocutory appeal, the government cannot credibly complain about additional delay that may result from the orderly conclusion of that process.

Certiorari is also warranted to correct the Ninth Circuit's distorted reading of 18 U.S.C. § 3288. The plain language of § 3288 articulates Congress's intent in affording prosecutors the ability to correct flaws in an indictment except where a charge—here, the conspiracy's knowing endangerment object—was not brought within the applicable statute of limitations. The fundamental due process protection provided to defendants by the statute of limitations must be respected in the Ninth Circuit, as in other federal courts.

ARGUMENT

1. The government does not seriously defend the Ninth Circuit's use of petitioners' supposed subjective intent in assessing whether the CAA provided fair notice that its definition of "asbestos" includes richterite and winchite. Nor does the government argue that the Ninth Circuit's approach is consistent with the precedents of this Court or other federal courts of appeals. Rather, it dismisses the Ninth Circuit's approach as "dictum," claiming that the Ninth Circuit held that "the statute alone provided fair notice." U.S. Br. 21-22. But this statement appears nowhere in the court's opinion; rather, the Ninth Circuit's holding rests squarely on the petitioners' putative knowledge. Even if the holding were considered to be dictum, it is still, as noted in Grace's reply, "circuit law." *Barapind v. Enomoto*, 400 F.3d 744, 750-51 & n.8 (9th Cir. 2005) (*en banc*). Tellingly, the Ninth Circuit incorporated its reasoning into its specific holding, finding that "[a]sbestos is adequately defined as a term and need not include mineral-by-mineral classifications to provide notice of its hazardous nature, particularly to these knowledgeable defendants." Pet. App. 19a-20a.

The government claims, relying on a subsequent Ninth Circuit panel opinion that recites the fair notice standard applied by other federal courts of appeals, U.S. Br. 22 n.11 (citing *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008)), that the law of the Ninth Circuit is consistent with that of other circuits. This argument is wrong. *Shark Fins* was an *in rem* forfeiture action involving no individual

defendants and presenting no issue of a defendant's subjective intent, *see* 520 F.3d at 980-81. The case therefore provides no guidance as to whether, in a case analogous to this one, the Ninth Circuit would persist in looking beyond the core fair notice standard and consider subjective intent. The government has identified no other case in which a federal court of appeals has authorized such an approach in general, let alone on a record devoid of any evidence bearing on that subjective intent. This petition therefore presents a divergence requiring this Court's review.

The government seeks to minimize the extent of the Ninth Circuit's deviation from standard practice (and its unfair impact on the petitioners) by citing cases suggesting, largely in the context of facial challenges rather than actual prosecutions, that a statute need only provide notice to members of a particular specialized community. *See* U.S. Br. 19 (citing cases to argue that "asbestos as defined by the CAS registry has a sufficiently clear meaning in the relevant industry"). In advancing these arguments, the government, like the Ninth Circuit, deviates from this Court's clear directive in *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964). *Bouie* held that the adequacy of notice provided by a statute depends on its own words, not on the "basis of an ad hoc appraisal of the subjective expectations of particular defendants," and that the relevant question is whether a statute provides fair notice to a person of common intelligence. *Id.* at 355 n.5. The government is effectively using cases that pre-date *Bouie* and/or arose in a different context to advocate precisely the analysis that *Bouie* forbids. This

argument underscores a persistent confusion among practitioners and courts regarding the interplay between *Bouie* and the cited cases, and favors further review.[1]

The government also argues that "the presence of a culpable intent as a necessary element of the offense," U.S. Br. 20, eliminates any fair notice concerns. This argument is not only wrong but begs the very question presented in this petition. The government correctly notes that the CAA charges require proof that the petitioners knowingly released "asbestos" and that they knew the releases would endanger others. *Id.* Proof of such knowledge, however, would have no bearing on whether the statute, by its own terms, provides fair notice of which substances constitute "asbestos." The government's argument confuses the concepts of *mens rea* and fair notice. Assume that the statute and related regulations contained no definition of "asbestos" whatsoever; even a defendant's scientific knowledge that a certain mineral was properly classified as

[1] The government's effort to apply *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), and similar cases to these facts fails. Even if such approach were proper, which it is not in light of this Court's precedents, the government makes no effort to define the relevant industry in this case or to show that the individual petitioners have a place in it. And, unlike in the cases cited by the government, the definition of asbestos inherently involves analysis of such things as chemical composition and whether a substance is fibrous -- two things that require specialized scientific knowledge -- and will always involve a subjective inquiry. This approach, advocated by the government, thus leads inevitably to analysis of the petitioners' subjective knowledge, without any record evidence to support that analysis.

"asbestos" would not save the statute from a fair notice challenge. *See Bouie*, 378 U.S. at 355 n.5 ("The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law . . . .").

2. The government claims that petitioners will face no prejudice if this Court declines further review because the excluded evidence would have been admissible under the district court's original order adopting the EPA definition of "asbestos." U.S. Br. 14. This assertion is incorrect and strikingly inconsistent with both the district court's order and the government's position below. Indeed, if the government believed it could still prove its case despite the district court's ruling, there was no reason for it to have taken this appeal in the first place.

In response to the district court's ruling that it would not allow presentation of "any sampling data that commingles the minerals making up what the government calls 'Libby amphibole,' without differentiating between minerals covered by the Clean Air Act and minerals not covered," Pet. App. 63a, the government has asserted the importance of the excluded evidence in both pre-trial and appellate proceedings. First, the government's certification under 18 U.S.C. § 3731 stated:

> The sampling evidence and analytical results excluded by the district court's August 7 and August 9, 2006 orders are material to the government's required proof that the defendants released or caused the release of

> a hazardous air pollutant, asbestos, conspired to defraud the United States, and obstructed the EPA. Moreover, the foundational requirements for the admission of the government's Clean Air Act evidence established in these orders has the practical effect of excluding much of the government's evidence relevant to the crimes charged in the Superseding Indictment.

See CR-05-07-M-DWM Dkt. No. 731 at 2 (D. Mont. Aug. 23, 2006) (footnote omitted). In its oral argument before the Ninth Circuit, the government similarly acknowledged that the district court's ruling would prevent it "from presenting facts and data that came from . . . EPA's asbestos sampling in Libby . . . ." Andrew Schneider, *Big Asbestos Prosecution in Jeopardy, U.S. Argues*, Seattle Post Intelligencer, June 5, 2007, *available at* http://seattlepi.nwsource.com/local/318479_grace05.html. The government's current assertion also conflicts with the district court's observation that its rulings "will likely render inadmissible much of the government's proof relating to the Clean Air Act allegations." *United States v. W.R. Grace*, 455 F. Supp. 2d 1133, 1140 n.3 (D. Mont. 2006).

The excluded evidence is dispositive not only of the three counts (out of seven) that relate to the CAA, but also likely the conspiracy count insofar as proof of the CAA object depends on the same evidence. Despite the government's present assertions to the contrary, this evidence is of the utmost importance to the government's case and a

reversal of the Ninth Circuit's decision would dramatically alter the composition of this case.

3. As explained in the individuals' petition, Pet. 31-38, certiorari is also warranted to review the Ninth Circuit's incorrect and pernicious misreading of § 3288. The government's arguments to the contrary are unpersuasive.

In particular, the government ignores the critical flaw in the Ninth Circuit's ruling: under its interpretation of § 3288, the government can bring an untimely indictment—that is, one that does not allege that the defendants committed the crimes for which they are indicted within the relevant statute of limitations—suffer dismissal on that ground, and then use the six-month grace period afforded by § 3288 to resuscitate the prosecution by identifying and alleging an act within the original limitations period. As a practical matter, under this analysis, § 3288 would never preclude the government from filing a superseding indictment in a conspiracy case if the original indictment was dismissed on statute-of-limitations grounds. But that result directly contradicts the plain language of § 3288—which specifies that "[§ 3288] does not permit the filing of a new indictment . . . where the reason for the dismissal [of the original indictment] was the failure to file the [original] indictment . . . within the period prescribed by the applicable statute of limitations"—and would render that provision a nullity. Critically, the government never explains when this clause might have any effect were it not to apply in the context of this case.

Rather than addressing this fundamental point, the government principally adopts the Ninth Circuit's novel and unsupportable distinction between a claim that is "time-barred" because the government failed to allege an overt act within the statute-of-limitations period, and a claim that is not timely filed. *See* U.S. Br. 23 (calling the flaw in the initial indictment a "pleading deficiency"). But that meaningless distinction merely obscures the true error below.[2] *See* Pet. 32-33. A claim is barred by a statute of limitations if the government has not alleged that the defendant committed that crime (in the context of a conspiracy claim, an overt act in support of the conspiracy) within the relevant time period. That was precisely the flaw with the initial indictment here. The mere fact that the government might have been able to obtain an indictment alleging a timely claim when it obtained the initial indictment does not remedy its failure to do so. Because it did not, the plain text of § 3288 precludes the government from getting another bite at the apple.

Thus, should the opinion below stand, criminal defendants in the Ninth Circuit will be stripped of a fundamental due process safeguard. *See Toussie v. United States*, 397 U.S. 112, 114-115 (1970).

4. Because the government has no response to the substantive issues raised by petitioners, it relies

[2] Contrary to the government's assertion, U.S. Br. 23 (citing F.E.R. 549), the district court did not hold that this claim was timely filed. The government has quoted what appears to have been a question from the district court at oral argument and suggested this was the court's ruling.

heavily on its claim that interlocutory review is inappropriate. The government argues that this Court should deny this petition to permit eventual review on a complete record and avoid further delay. Neither of these assertions is meritorious. This Court has emphasized that "there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (citing *Estelle v. Gamble*, 429 U.S. 97, 98 (1976); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)). This Court has granted review of criminal cases prior to trial. *See, e.g., Sabri v. United States*, 541 U.S. 600 (2004) (deciding criminal case in this posture over the Government's opposition).

Because the questions presented in this petition are dispositive of several counts in the indictment, a decision affirming the district court's construction of the statute would substantially narrow the scope and shorten the length of trial. As the Ninth Circuit noted in its recent *en banc* decision addressing the government's first interlocutory appeal, the complexity of this "case poses special challenges to the parties in preparing for trial and to the court in managing the litigation." *United States v. W.R. Grace*, No. 06-30192, 2008 U.S. App. LEXIS 10453, at *38 (9th Cir. May 15, 2008) (*en banc*). By granting review and clarifying the proper definition of "asbestos" before trial, this Court will promote judicial economy and reduce the burden of trial on the individual petitioners, all of whom are over 68 years of age, as well as on prospective witnesses. The government's desire to have witnesses and victims observe the trial cannot trump the aging

petitioners' right not to stand trial, especially a trial of this magnitude, on patently flawed charges. The government's concerns about delay do not ring true, as the government set the delay in motion by filing an interlocutory appeal in the first instance.

If the petitioners proceed to trial now and prevail, the Ninth Circuit's erroneous reasoning will escape this Court's review and remain the law governing all parties subject to its jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should either summarily reverse the decision below or set the case for plenary review.

Respectfully submitted,

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